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Supreme Court, U.S.
FILED

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No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2003

ATTORNEY E

Petitioner,

vs.

THIRD PARTY MOVANTS FOR PROTECTIVE ORDER

Respondents.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED

Whether the First Amendment's prohibition on prior restraints requires vacating a court order prohibiting disclosure of certain documents, where the order was entered against the subject of an investigation (i) who did not initiate the subpoena pursuant to which the documents were produced, (ii) who was provided the documents in the course of the investigation without any restriction on their use, and (iii) who obtained and disseminated the documents (as expressly permitted by state rule) before the order prohibiting dissemination was sought or entered.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Office of Attorney Regulation Counsel for the Colorado Supreme Court was a party to the proceedings before the Colorado Supreme Court. The caption does not identify Attorney E or the third party movants by their real names, in accordance with the procedure followed by the Colorado Supreme Court in this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

INTRODUCTORY STATEMENT 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

The Opinion Below Incorrectly Resolves an Issue Left Open in Seattle *Times v. Rhinehart* and Unconstitutionally Expands the Holding of that Case 5

The Opinion Below Conflicts with a Long Line of Cases Holding that Courts May Not Recall Information from the Public Domain. 7

The Opinion Below Perpetuates an Unconstitutional Prior Restraint on Petitioner's Speech 9

CONCLUSION 12

APPENDIX

Appendix A – Amended Opinion of the Colorado Supreme Court Filed September 4, 2003 ..... 1a

Appendix B – Protective Order Issued By The Presiding Disciplinary Judge.....(filed separately under seal)

TABLE OF AUTHORITIES

CASES

Butterworth v. Smith, 494 U.S. 624 (1990)..... 8, 10

CBS Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994) 10

Fed. Trade Comm'n. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952)..... 1

In re Attorney E, 73 P.3d 648 (Colo. 2003) 1, 4, 6, 7, 9

In re Charlotte Observer, 921 F.2d 47 (4th Cir. 1990)..... 8

Landmark Communications Inc. v. Virginia, 435 U.S. 829 (1978) 8, 10

Monitor Patriot v. Roy, 401 U.S. 265 (1971)..... 10

Near v. Minnesota, 283 U.S. 697 (1931) 9

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) .. 9, 10

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 11

New York Times v. United States, 403 U.S. 713 (1971)..... 9

Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) 8

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996) 8, 9, 10

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) 2, 5, 6, 7, 9

Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) 8

Star-Telegram, Inc. v. Walker, 834 S.W.2d 54 (Tex. 1992) 8

STATUTES

28 U.S.C. § 1257(a) 1

Attorney E respectfully petitions for a writ of certiorari to review the opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The order and opinion of the Colorado Supreme Court, as modified on denial of rehearing, are reported at *In re Attorney E*, 73 P.3d 648 (Colo. 2003) (App., *infra*, 1a). On September 4, 2003, the court *sua sponte* proposed to modify the opinion a second time. The proposed modifications are reflected in the Appendix, but may not yet be reflected in the electronic reports of the case. The order of the Presiding Disciplinary Judge ("PDJ") of the Colorado Supreme Court is unreported. The Disciplinary Judge's order is filed separately under seal, in order to honor the Colorado Supreme Court's evident wish to protect the parties' identities.

JURISDICTION

The Colorado Supreme Court issued an opinion on June 16, 2003. On July 3, 2003, the court issued a modified opinion and denied Attorney E's timely-filed petition for rehearing. (The court proposed a second set of modifications on September 4, 2003; however, these modifications would not be substantive. *See, e.g., Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) (time to seek certiorari does not begin to run anew when lower court makes non-substantive changes to its opinion).) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

INTRODUCTORY STATEMENT

Courts are frequently asked to "recall" sensitive or confidential information after it is disclosed in litigation without restrictions on its use. This Court's leading protective order case, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), does not address whether or under what circumstances such *ex post facto* restrictions are constitutional, or whether a protective order must be imposed before information is disclosed—as it was in *Seattle Times*—in order to pass constitutional muster. The frequency with which the question presented here arises, coupled with the seriousness of a prior restraint on speech, calls for this Court's review.

This case squarely presents the issue of whether and under what circumstances courts may enter *ex post facto* protective orders. The decision below expands *Seattle Times* beyond its rationale, and conflicts with a long line of authorities,

including decisions of this Court, which hold that courts may not withdraw information from the public domain. Because *Seattle Times* does not properly apply to the protective order at issue in this case, the lower court's opinion perpetuates a prior restraint on Attorney E's speech, contrary to the First and Fourteenth Amendments and the decisions of this Court.

STATEMENT OF THE CASE

In order to place this dispute in context, a brief history of the litigation follows: In early 2001, Colorado's Office of Attorney Regulation Counsel ("ORC") began an investigation of Petitioner Attorney E, a Colorado attorney.[1] The investigation involved, *inter alia*, allegations that Attorney E had accused two sitting state court judges (respondents here) of serious misconduct. During the course of the ORC's investigation, it subpoenaed investigatory files from the FBI that documented the FBI's criminal investigation of the judges. After it obtained the FBI documents, ORC sent a copy to Attorney E. ORC did *not* place any restriction on Attorney E's use of the documents,[2] and the Colorado attorney discipline rules specifically authorized Attorney E to disclose the documents to third parties. *In re Attorney E*, 73 P.3d at 653 (interpreting COLO. R. CIV. P. 251.31(a)). Moreover, as demonstrated by the record below, ORC did not subpoena the documents on behalf of Attorney E; rather, Attorney E learned of the subpoena only after it was issued.

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[1] To date, this investigation has not proceeded beyond the investigatory stage.

[2] The body of the transmittal letter contained only one sentence: "Enclosed please find copies of the documents I received pursuant to the subpoena served on the FBI."

Shortly after receiving the documents, Attorney E transmitted them to certain third parties, including state officials, believing that the files suggested serious wrongdoing by the judges (some of which occurred while the judges were acting in their judicial capacity), and seeking information about the matters alleged in the files for use in defense of the discipline charges. Attorney E also filed the documents in certain court proceedings in which he believed they were relevant.

Approximately two weeks *after* Attorney E received the documents (and after Attorney E had already transmitted the documents to the third parties), respondents sought a protective order prohibiting Attorney E from further disseminating the FBI documents. The Presiding Disciplinary Judge[3] charged with hearing such motions, first entered an interim protective order, and after briefing and argument, entered a permanent order. The order prohibits Attorney E from disclosing "the FBI documents and the information contained therein . . . to any other person or entity without further Order of this Court." Order at 6. As reflected at length in the Presiding Disciplinary Judge's order, Attorney E raised the applicability of *Seattle Times* and argued that the protective order would violate the First Amendment. The Colorado Supreme Court first denied, then *sua sponte* granted, Attorney E's petition for review.[4] It upheld the protective order, holding that the order was constitutional because it fell within the holding of *Seattle Times* and thus comported with the First Amendment, though the court modified the order to permit Attorney E and ORC to use information from

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[3] The Presiding Disciplinary Judge, an adjunct of the Colorado Supreme Court, is involved in various aspects of the Colorado attorney discipline process.

[4] In the interim between the denial and grant of his petition for review, Attorney E filed a petition for certiorari in this Court, which petition was denied on June 17, 2002. The docket number for Attorney E's previous petition for certiorari is 01-1365.

the documents in the investigation. The Colorado Supreme Court left intact that portion of the protective order that prohibits Attorney E from disclosing the existence of the FBI documents, or from informing witnesses that particular bits of information came from the FBI documents.

REASONS FOR GRANTING THE WRIT

The Opinion Below Incorrectly Resolves an Issue Left Open in Seattle *Times v. Rhinehart* and Unconstitutionally Expands the Holding of that Case

In *Seattle Times*, 465 U.S. at 31, this Court held that a protective order does not violate the First Amendment if it both grants a litigant a right of access to discovery materials and at the same time places limits on the litigant's use of those materials. *Id.* at 32. Since a litigant has no right of access to discovery, "continued court control" over the fruits of discovery does not offend the First Amendment. *Id.*

The *Seattle Times* Court reached this conclusion by reference to an implied bargain between the court and the litigants. The Court reasoned that parties to a lawsuit do not have a First Amendment right to discover information from their opponents. *Seattle Times,* 467 U.S. at 32. It follows from this principle that under some circumstances, it does not offend the First Amendment to restrict a party's use of discovery materials as a *quid pro quo* for access, since the party has no constitutional right to access the materials at all. *Id.* Since the order at issue in *Seattle Times* both granted access and placed limits on that access, the protective order in the case did not offend the First Amendment. *Id.*

Seattle Times leaves open the question of whether a protective order is constitutional if it is imposed *after* an individual obtains discovery materials, without any limitation on their use. In such a case there is no *quid pro quo* for access,

since the litigant cannot be said to have given up the right to publish the documents in exchange for access to discovery.

This case squarely presents the question left open in *Seattle Times*, because there was plainly no *quid pro quo* for access, yet the court below held (we submit, incorrectly) that *Seattle Times* applies. Attorney E, as the target in an attorney discipline proceeding, received the documents at issue without a request for them on his part and without any restriction on their use. Moreover, the Colorado attorney discipline rules, as authoritatively construed by the Colorado Supreme Court, specifically authorized Attorney E to disclose the documents to third parties. *In re Attorney E*, 73 P.3d at 653 (interpreting COLO. R. CIV. P. 251.31(a)). Having received the documents without restriction on his First Amendment rights therein, Attorney E published the documents to third parties. Only after Attorney E obtained and exercised his First Amendment rights did the court below step in to impose an "*ex post facto*" prior restraint on his speech.

In spite of the difference between *Seattle Times* and this case, the court below held that *Seattle Times* authorizes the protective order here. According to the lower court, the availability of discovery is a matter of "legislative grace," to which parties like Attorney E have no right, and *Seattle Times* authorizes courts to issue protective orders at *any* time during the discovery process. *In re Attorney E*, 73 P.3d at 658. This includes situations like the instant case, in which the subject of an investigation holds documents he did not subpoena, received without any restriction on their use (and indeed, with explicit authorization from the Colorado Rules of Civil Procedure to disseminate the documents), and publishes those documents to third parties before the court imposes a restriction.

By reading *Seattle Times* so expansively, the court below extended the case beyond its rationale. The linchpin of *Seattle Times* is the proposition that a private litigant in a civil

proceeding has no First Amendment right of access to discovery. *See Seattle Times,* 467 U.S. at 32. In this case, a right of access is beside the point: unlike the civil litigant in *Seattle Times*, Attorney E did not seek discovery of the FBI documents, rather he already had access to the documents, and had explicit authorization from the attorney discipline rules to disseminate the documents to third parties. Unlike the civil litigant in *Seattle Times*, Attorney E could not have agreed to keep the documents confidential in exchange for a right of access. This Court should grant certiorari to correct this overly expansive reading of *Seattle Times*.

The Opinion Below Conflicts with a Long Line of Cases Holding that Courts May Not Recall Information from the Public Domain.

In addition to extending *Seattle Times* beyond its rationale, the opinion below is contrary to the long line of authority holding that courts may not impose *ex post facto* restrictions on speech and withdraw information from the public domain, even if that information is inadvertently or improperly released.

This Court's opinion in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (per curiam), provides an excellent example of this principle. *Oklahoma Publishing* held that where a petitioner obtained information lawfully and with the state's implicit approval, a restraint on publication of the information so obtained constituted an impermissible prior restraint, even though the law provided that the information in question should remain confidential. *Id.* *Oklahoma Publishing*, with obvious parallels to the instant case, is not alone. There is a plethora of authority vindicating the same principle. *See, e.g., Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (prior restraint not justified on publication of lawfully obtained documents, even

though those documents were under seal when obtained); *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (injunction against revealing name of target of grand jury investigation, issued immediately after the name was inadvertently revealed in open court, is unconstitutional); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) ("[t]he law cannot recall information once it is in the public domain"); *see also*, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (First Amendment bars penalties for publication of lawfully obtained information); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (same); *Landmark Comm. Inc. v. Virginia*, 435 U.S. 829, 838-39 (1979) (holding that the First Amendment prohibits criminal punishment of persons who divulge or publish truthful information about the confidential proceedings of a judicial inquiry and review commission).

The opinion below—upholding a protective order that essentially recalled information from the public domain—improperly disregards this authority. The court below holds that a court may issue a protective order restraining the use of materials obtained in discovery at any time before the materials are introduced at a formal proceeding. *In re Attorney E*, 73 P.3d at 658. This would be true even if the person whose speech is restrained acquired the materials years before the restraint, without any restriction on their use.

This Court should grant the writ to vindicate the First Amendment principle that courts may not withdraw information from the public domain, and to resolve the conflict between the Colorado Supreme Court's ruling and the numerous cases cited above.

The Opinion Below Perpetuates an Unconstitutional Prior Restraint on Petitioner's Speech

Because the protective order in this case does not fall under *Seattle Times*, it is an unconstitutional prior restraint on

speech. Court injunctions against future speech—like the one at issue in this case—are paradigm prior restraints. *See, e.g., Procter & Gamble Co.*, 78 F.3d at 225. Of course, "*prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.*" *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (emphasis added), and this Court has never upheld any restriction deemed a prior restraint. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Procter & Gamble Co.*, 78 F.3d at 227 (stating that the Supreme Court has never upheld a prior restraint).

Analyzed as an "ordinary" prior restraint, the protective order in this case fails to pass constitutional muster. The "most extraordinary remedy" of prior restraint is justified "only where the evil that would result from the reportage is both great and certain and cannot be militated [sic] by less intrusive measures." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994) (summarizing the Supreme Court's prior restraint jurisprudence).

Here, the "evil" from disclosing the FBI documents is neither "great" nor "certain." It is clear that there is no sufficiently strong governmental interest to counterbalance infringement of Attorney E's First Amendment rights, particularly since the subject of Attorney E's speech—alleged governmental misconduct—lies at the core of the First Amendment. *See, e.g., Butterworth*, 494 U.S. at 632; *Landmark Communications Inc.* 435 U.S. at 838 (stating that communication about judicial misconduct lies at the core of the First Amendment); *see also Monitor Patriot v. Roy*, 401 U.S. 265, 277 (1971)("a charge of criminal conduct, no matter how

remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office . . .").[5]

Finally, any harm is uncertain because the judges would suffer a legally cognizable injury only if the allegations in the FBI papers are demonstrably false and published with "actual malice."[6]

For these reasons, the prior restraint in this case is an unconstitutional infringement on Attorney E's speech, and this Court should grant certiorari to vindicate Attorney E's First Amendment rights.

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[5] Colorado judges are subject to periodic retention elections.

[6] "Actual malice" in this context means that the speaker published the statement with knowledge that it was false or with reckless disregard of whether it was false or not. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

CONCLUSION

For the reasons stated above, Petitioner Attorney E asks that this Court grant his petition for a writ of certiorari to review the opinion of the Colorado Supreme Court in this matter.

Respectfully submitted,

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APPENDIX A – PROPOSED AMENDED OPINION OF THE COLORADO SUPREME COURT FILED SEPTEMBER 4, 2003[†]

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Original Proceeding in Discipline Pursuant to C.A.R. 21 and C.R.C.P. 251(d) Case No. 01PDJ098 Honorable Roger L. Keithley, Presiding Disciplinary Judge	Case No. 01SA404
In Re: IN THE MATTER OF THE REQUESTS FOR INVESTIGATION OF ATTORNEY E.	
RULE MADE ABSOLUTE IN PART AND DISCHARGED IN PART EN BANC June 16, 2003[‡] **Opinion modified and, as modified, Petition for Rehearing DENIED. EN BANC.** **JULY 2, 2003**	

[†] The opinion set forth below reproduces the Colorado Supreme Court's "blackline" notation, indicating the edits that the Court proposes to make to its previous opinion as modified on denial of rehearing.

Appendix A

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JUSTICE BENDER delivered the Opinion of the Court.
CHIEF JUSTICE MULLARKEY does not participate.

I. Introduction

Footnote continued from previous page
[‡ The opinion was originally issued on June 16, 2003, but was modified on denial of rehearing on July 2, 2003.]

Appendix A

In this original proceeding we construe our rules governing the investigative phase of our attorney regulation system. We hold that the attorney, who is the target of the investigation, is a "party" to the investigative proceedings. Because our rules governing discovery by the Attorney Regulation Counsel incorporate certain provisions of the rules of civil procedure, Attorney Regulation Counsel must provide the target attorney with notice of the subpoenas and copies of the subpoenaed documents. In addition, we affirm the Presiding Disciplinary Judge's protective order directing that documents subpoenaed from the FBI by Attorney Regulation Counsel be treated as confidential. We hold that this protective order does not violate the targeted attorney's First Amendment rights. However, on remand we direct the Presiding Disciplinary Judge to modify the terms of the protective order to permit both parties to this disciplinary proceeding, Attorney Regulation Counsel and the targeted attorney, to use the documents to further their respective cases provided neither discloses the existence of the documents themselves nor informs a witness that the information came from the confidential FBI documents. However, if either party finds it necessary and essential to their respective cases to disclose to witnesses that certain information comes from the confidential documents, they may apply to the Presiding Disciplinary Judge for a modification of the protective order to permit such disclosure.

Attorney Regulation Counsel ("ARC") was investigating allegations of misconduct regarding the target attorney, "Attorney E."[1] During the investigation, ARC subpoenaed FBI documents. As mandated by the disciplinary and discovery rules of civil procedure, ARC provided copies of those documents to Attorney E as the party to the investigative proceedings. When Attorney E publicly disclosed the documents and implicated

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[1]These proceedings and the attorney under investigation remain confidential under our disciplinary rules. See C.R.C.P. 251.31 (2002).

privacy interests of third parties named in the documents, the third parties obtained a protective order from the Presiding Disciplinary Judge ("PDJ"). The PDJ noted that the rules provide that the investigative stage of a disciplinary proceeding is confidential until ARC files a formal, public complaint with the PDJ. Hence, the PDJ reasoned that the subpoenaed FBI documents were also confidential, even to the attorney under investigation. The PDJ concluded that ARC erred by providing the FBI documents to Attorney E and prohibited further disclosure of the documents or their contents by either ARC or Attorney E unless either party obtained the information from an independent source or until any person filed the documents in a public proceeding. Both ARC and Attorney E petitioned this court to have the protective order vacated.

We issued a rule to show cause why the petitioners relief should not be granted and now make the rule absolute in part and discharge it in part. We affirm the issuance of a protective order to protect the privacy interests of third parties but remand to the Presiding Disciplinary Judge with directions to modify the terms of the protective order consistent with this opinion.

II. Facts and Proceedings Below

Because certain information in this disciplinary proceeding remains subject to a protective order, we provide only those facts which are pertinent to the resolution of this case.

ARC was investigating two matters involving Attorney E. Both matters concerned, in part, statements Attorney E made about ~~two~~ a Colorado judges. Specifically, Attorney E asserted that ~~the judges had purchased and used cocaine~~the judge had engaged in criminal misconduct.

During ARC's investigation, a witness stated that the FBI had investigated and ~~both judges and had~~ developed evidence of

the judge's~~' cocaine use~~misconduct.[2] Another judge was involved in, but not the subject of, the FBI investigation. ARC issued investigative subpoenas to the FBI requesting any reports in that agency's records pertaining to ~~drug~~ the investigations of the ~~two~~ judges pursuant to ARC's authority under C.R.C.P. 251.10(b)(2)(2002). Rule 251.10(b)(2) incorporates Rule 45, which in turn incorporates specific discovery provisions of Rules 26 and 30.[3] Following those rules, ARC sent a notice of its

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[2] The United States Attorney for the District of Colorado declined the case and the investigation was terminated with no further proceedings.

[3] C.R.C.P. 251.10(b)(2) provides in relevant part:

> **(b) Procedures for Investigation.**
>
> (2) Procurement of Evidence During Investigation.
>
> . . . In connection with an investigation of allegations made against an attorney . . . the Regulation Counsel may issue subpoenas to compel . . . the production of pertinent . . . papers [and] documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. (emphasis added).

C.R.C.P. 45 provides in relevant part:

> **(b) For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . .
>
> **(c) Service** . . . . The party issuing or causing the issuance of the subpoena pursuant to this rule, except in post-judgment proceedings, shall serve a copy of the subpoena . . . upon all parties of record . . . . (emphasis added).
>
> **(d) Subpoena for Taking Depositions; Place of Examination.**

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record deposition to Attorney E as the "party" to the investigative proceedings. Because Attorney E was also entitled to the documents themselves as a party to the proceedings, ARC forwarded him copies that had been redacted by the FBI.

After receiving the FBI documents describing the investigation of the ~~two Colorado~~ judges for ~~cocaine use~~alleged criminal misconduct, Attorney E publicly distributed the FBI documents by filing them in various courts of record. Following the public disclosure, ~~the two judges named~~the accused judge and the other judge mentioned in the FBI investigation documents filed petitions with the PDJ under C.R.C.P. 251.31 seeking a protective order[4] classifying the FBI documents as "confidential" and limiting Attorney E's use of them.

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> (1) A Deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26. (emphasis added).

C.R.C.P. 26 provides in part:

> **(a)(1) Disclosures**. . . . [A] party shall, without awaiting a discovery request, provide to other parties:
>
> (B) A . . . copy of . . . all documents . . . in the possession, custody, or control of the party that are relevant to disputed facts . . . . (emphasis added).

[4] C.R.C.P. 251.31 provides:

(a) Availability of Information. Except as otherwise provided by these rules, all records, except the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint . . . . (emphasis added).

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Appendix A

In response to the judges' petition, the PDJ issued a protective order. In his order, the PDJ ruled that the FBI documents were "confidential" under the various subsections of 251.31.[5] The PDJ reasoned that unless and until ARC files a

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Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons. (emphasis added).

(b) Confidentiality. Before the filing and service of a complaint . . . the proceedings are confidential within the Office of Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession.(emphasis added).

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential . . . . (emphasis added).

[5] The PDJ also concluded that the FBI documents were "confidential" by virtue of the federal Freedom of Information Act, 5 U.S.C. § 552 and the Federal Privacy Act, 5 U.S.C. §

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formal complaint, the investigations of ARC were confidential — even to the target of the investigation. Because Attorney E, as the target of the investigation, was not a "party" to the proceedings until ARC initiated the complaint process, C.R.C.P. 251.10 did not require or authorize ARC to provide Attorney E or anyone else with confidential documents obtained pursuant to the subpoena. Accordingly, the PDJ prohibited not only Attorney E but also ARC from further use of the FBI documents or the information contained within the documents without an order of the court. The PDJ concluded that the protective order did not prevent any person acquiring the same information from an independent source from disclosing such information or any person from disclosing the information once it was filed in a public proceeding.

In response to the PDJ's protective order, ARC petitioned this court pursuant to C.A.R. 21 and C.R.C.P. 251.1(d)[6] to have it vacated because it misconstrued ARC's obligations when an investigative subpoena is issued, overextended Rule 251.31's conception of confidentiality, and hindered ARC's investigation of Attorney E by unduly limiting the purposes to which the FBI documents may be put. Attorney E also filed a motion for leave to intervene in support of ARC's petition, arguing that the

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552(a). Because the two judges named in the FBI documents appropriately sought a protective order under C.R.C.P. 251.31(e), we decline to analyze this Colorado disciplinary case under either the Freedom of Information Act or the Federal Privacy Act.

[6] C.R.C.P. 251.1(d) states:

(d) Plenary Power of the Supreme Court. The Supreme Court reserves the authority to review any determination made in the course of a disciplinary proceeding and to enter any order with respect thereto, including an order directing that further proceedings be conducted as provided by these Rules.

protective order violated his First Amendment right to free speech.[7]

We granted ARC's petition under C.A.R. 21 and 251.1(d) and Attorney E's motion to intervene and issued a rule to show cause why the petitioners' relief should not be granted. As a result, the protective order remained in effect but the underlying disciplinary proceedings against Attorney E were stayed pending our resolution of the issues.

We now hold that Attorney E is a "party" to ARC's investigation proceedings and as such, the protective order does not violate his First Amendment rights. As background for our discussion of these issues, we briefly review the investigation stage of the attorney regulation system.

III. The Investigation Stage of the Attorney Regulation System

The investigation of allegations against an attorney proceeds as follows.[8] Once ARC makes the determination to investigate an attorney, it provides the attorney in question with written notice of the nature of the allegations. C.R.C.P. 251.10(a). The attorney must respond to the allegations in writing. Following the attorney's response, the case is assigned to an ARC investigator. Id. Once ARC initiates the investigation, the target attorney has a duty to cooperate and participate throughout the investigation. C.R.C.P. 251.5(d); In re Weisbard, 25 P.3d 24, 28 (Colo. 2001).

ARC has broad powers to procure evidence during the investigation. See C.R.C.P. 251.10(b)(2). ARC may issue subpoenas to compel the attendance of witnesses, including the

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[7] Attorney E filed a Petition for Writ of Certiorari to the United States Supreme Court regarding the PDJ's protective order. The U.S. Supreme Court denied the Petition in June 2002.

[8] Colorado's attorney regulation system also includes a formal complaint stage. See C.R.C.P. 251.12, 251.14.

attorney in question, for investigative proceedings. ARC may also issue a subpoena for the production of documents -- a subpoena duces tecum which literally means "bring with you" -- to obtain pertinent books, papers, documents or any other evidence pertinent to the investigation. While ARC's investigative powers are not subject to all of the rules of civil procedure,[9] they are subject to certain discovery rules because of the express incorporation of C.R.C.P. 45.

C.R.C.P. 45 allows, among other things, ARC to subpoena documents in the hands of a nonparty so long as it follows the formal requirements of the rule. C.R.C.P. 45(b). Those requirements mandate that that the person issuing the subpoena must serve a copy of the subpoena, including a complete list of documents and things requested to be provided pursuant to the subpoena, upon all "parties of record." C.R.C.P. 45(c). Rule 45 does not permit a person to subpoena documents by themselves; rather, the items sought may be sought only in connection with a subpoena for a deposition.[10] 4 Sheila K. Hyatt and Stephan A. Hess, Colorado Civil Rules Annotated § 45.3 (3rd ed. 1998). Rule 45 is also subject to Rule 26, which requires that parties receive copies of all documents that are "relevant to disputed facts" in the proceedings. C.R.C.P. 26(a)(1)(B).

Following the specific discovery rules of civil procedure found in Rules 45, 30, and 26, when ARC issues a deposition subpoena for documents, it serves a copy of the subpoena on the attorney under investigation as the "party" and provides copies of the documents. Such disclosure of documents from ARC to the attorney under investigation is consistent not only with the

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[9] For example, disciplinary hearings must be conducted in conformity with the Colorado Rules of Civil Procedure and the Colorado Rules of Evidence. C.R.C.P. 251.18(d).

[10] Under C.R.C.P. 30, a litigant may depose a third party and compel the production of documents following the requirements of C.R.C.P. 45.

discovery rules but also with the confidentiality provisions of Rule 251.31, which provide that only the "proceedings" are confidential. ARC has also historically interpreted the provisions of Rule 251.10(b)(2), and its predecessor Rule 241.10, to require a similar result.

Rule 241.10 also incorporated Rule 45 and thus the discovery obligations of the disciplinary investigator have not changed. See C.R.C.P. 241.10 (1998). The Office of Disciplinary Counsel, the predecessor to ARC, always gave the attorney under investigation notice of any investigatory subpoena related to the attorney's case and copies of any documents obtained in the investigative process. The reasons for this practice were fairness and privacy. For example, ARC frequently subpoenas personal, medical, and business records from an attorney during the investigation. Such records implicate the attorney's right of privacy. See People v. Lamb, 732 P.2d 1216, 1220 (Colo. 1987); Benson v. People, 703 P.2d 1274, 1280 n.7 (Colo. 1985). As a matter of long-standing procedure and practice, therefore, when ARC issues document subpoenas, it provides notice of the subpoena and copies of the documents to the attorney under investigation.

Once the attorney under investigation receives such documents, he or she may use them in various ways. The attorney may need to review them to determine the strength of the case against him or her and whether a "conditional admission" is warranted. C.R.C.P. 251.10(b)(4). A conditional admission occurs when ARC and the attorney under investigation agree upon a conditional admission of misconduct in lieu of a formal complaint when the form of discipline is no greater than a private admonition. Id. Such admissions promote one of the goals of the attorney discipline system: the speedy and informal resolution of minor misconduct.[11]

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[11] This court substantially reorganized and revised the attorney discipline system rules in 1999. One of the important changes was to provide alternatives to discipline to permit the diversion

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The accused attorney may also disseminate the documents and the information contained within the documents to the public according to the provisions of Rule 251.31(a) and (b). Under Rule 251.31(b), the confidentiality provisions apply only to the "proceedings." There is no separate confidentiality provision for investigation documents.

The second paragraph of Rule 251.31(a) explicitly allows the attorney under investigation, the complaining witness, and any other witness to the investigative proceedings to disclose the existence of disciplinary proceedings or to disclose any documents or correspondence served on or provided to these persons. C.R.C.P. 251.31(a). Thus, the disciplinary rules explicitly allow the participants in the investigation -- the accused attorney, the complaining witness, and any other witness -- to disclose the existence of the investigative proceedings and documents before ARC files a formal, public complaint against the accused attorney.[12]

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of certain cases of minor misconduct so as to avoid formal complaint proceedings. See C.R.C.P. 251.13.

[12] There is no such public disclosure provision for ARC. However, before the filing of a complaint, ARC may disclose the pendency, subject matter, and status of an investigation to the public in four situations:

(1) The respondent [attorney under investigation] has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public; or

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession.

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The ability of the accused attorney to disclose documents received from ARC is consistent with the goals of the revised attorney discipline system. Before the enactment of our current rules, the accused attorney could not disclose such documents or the existence of grievance proceedings unless permitted to do so by this court.[13] One of the major goals of the amendments was to make the system of attorney discipline more publicly visible.[14] Thus, the "confidentiality" provisions of the old system were greatly reduced by the new discipline system. The ability of the accused attorneys and witnesses to the investigative proceedings to disclose information if they choose reflects this goal of visibility.

The ability of the accused attorney, the complaining witness, or any other witness to disclose information or documents received from ARC during an investigation, however, is not unlimited. To protect the interests of a complainant, witness, third party, or the accused attorney, any person may petition the PDJ for a protective order upon a showing of good cause. C.R.C.P. 251.31(e). Such orders prohibit the disclosure of information otherwise privileged or confidential and direct

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C.R.C.P. 251.31(b).

[13] Prior to 1999, it was a disciplinary offense for an attorney to disclose pending grievance proceedings in the absence of an order granting such disclosure. C.R.C.P. 241.24 (1998); People v. Bottinelli, 782 P.2d 746, 751 (Colo. 1989)(discussing confidentiality provisions of C.R.C.P. 241.24).

[14] The Attorney Regulation System Planning Committee, evaluating changes to the disciplinary rules, reported to this court that the system of attorney discipline in Colorado must meet the major goal of providing a fair, efficient, and visible process to resolve complaints charging attorneys with misconduct. See 1997 Report of the Colorado Attorney Regulation System Planning Committee, Public Hearing, February 23, 1998, 27 Colo. Lawyer 2, 23 (Feb. 1998).

that the proceedings be conducted so as to implement the order. Id. Rule 251.31(e) is consistent with the power of the court to issue a protective order under C.R.C.P. 26(c) to preclude dissemination of discovery information, upon good cause shown, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Having reviewed the attorney discipline rules and their incorporation of the discovery rules of civil procedure during the investigation stage, we turn to the application of these rules to this case.

IV. The Attorney Regulation System Authorized and Required Attorney Regulation Counsel to Provide Attorney E with Notice of the Investigative Subpoena and the Subpoena Documents Because Attorney E Is a Party to the Proceeding

Initially, we must determine whether Attorney E is a "party" to the investigative proceedings and thus entitled, as required by the specific discovery provisions of the rules of civil procedure, to notice of its subpoenas and the subpoena documents themselves. The PDJ's protective order concludes that he is not. He reasoned that ARC's subpoena for the FBI documents was issued under ARC's investigation powers pursuant to Rule 251.10. Under the confidentiality provisions of Rule 251.31, any documents obtained during an investigation are confidential, even from the attorney under investigation. Thus, even though Rule 251.10 refers specifically to C.R.C.P. 45 — which provides the discovery requirements and obligations for parties — the PDJ concluded that the investigative confidentiality rule supercedes the disclosure requirements of Rule 45 and the related discovery provisions.

We disagree. The PDJ's interpretation would render many of the disciplinary rules meaningless and prevent the accused attorney from participating fully in his or her investigation — contrary to the mandates and intent of our attorney regulation system. People v. Cooper, 27 P.3d 348, 354

(Colo. 2001)("Our fundamental responsibility in interpreting a statute is to give effect to [its] purpose or intent."). Thus, we hold that Attorney E is a party in the investigative proceedings.

The rules authorize and require the actions ARC took in its investigation of Attorney E. Pursuant to its broad investigative powers under Rule 251.10(b)(2), ARC subpoenaed the documents describing the FBI's investigation of the ~~two judges' cocaine use~~judge's alleged criminal conduct. ARC reasonably believed that such documents would shed light on its investigation of Attorney E's statements about the ~~same two~~ judge~~s and their drug use~~'s alleged misconduct. Rule 251.10(b)(2) is subject to the discovery requirements of Rule 45, and thus ARC had no choice but to follow the specific provisions of Rule 45.

Rule 45 mandates that persons serving subpoenas must provide notice of such subpoenas to all "parties" and incorporates the discovery provisions of Rule 26(a)(1)(B). Rule 26(a)(1)(B) requires that parties receive copies of all relevant documents. Thus, ARC provided Attorney E with notice of its deposition subpoena to the FBI and the documents produced as a result of that subpoena.

If Attorney E is not a party to the investigative proceeding, then no one is. In other words, if the attorney under investigation is not entitled to notice and the documents, then the explicit incorporation of Rule 45 into Rule 210.10 becomes meaningless. See Colorado Common Cause v. Coffman, 2003 WL 1562241 at *5 (Colo. App. March 27, 2003); see also State v. Nieto, 993 P.2d 493, 501 (Colo. 2000).

Other provisions of the disciplinary rules are similarly superfluous if Attorney E is not entitled to the subpoena documents. For instance, the power of the attorney under investigation to disclose investigative documents to the public pursuant to Rule 251.31(a) would be moot if ARC was precluded from providing those documents to the attorney in the first place. Such a result would be contrary to one of the main goals of the recent revisions of the rules: to allow liberal disclosures of information so as to provide a visible attorney discipline process.

The duty of the attorney to participate in his or her own investigation is also hindered significantly if the attorney does not have access to relevant documents until the investigation is completed and ARC files a formal complaint. To cooperate and participate in the investigative process, a respondent attorney must have meaningful access to the investigative documents and the evidence that form the substance of the investigation. If there is no exchange of investigative information between ARC and the attorney under investigation, there would be little reason for the attorney to pursue an informal resolution of the case and agree to a conditional admission. Without all of the information pertinent to their investigation, the accused attorneys would not be able to make informed decisions about such admissions. In addition, without a full disclosure of all the documents possessed by ARC, the attorney under investigation would be hindered in presenting arguments and evidence to the ARC investigator that the allegations against him or her are meritless and/or constitute a minor violation of the rules. The result would be to force matters into the formal proceeding stage when early sharing of information otherwise may result in early resolution of the investigation at a lesser expense to both parties. Such a result would strike at the heart of the one of the goals of the system: an efficient, speedy, and fair resolution of minor misconduct.

Given the plain language of the rules, ARC's present and historic interpretation of those rules, and the implications of a contrary interpretation that would render other rules in our attorney discipline system moot and create a secretive system that discourages informal resolution of discipline claims, we conclude that Attorney E was a "party" in his own investigation.[15] Thus, ARC appropriately followed the specific

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[15] Although we conclude that the respondent attorney, Attorney E, is a "party" to the investigative proceedings and thus entitled to notice and copies of any subpoenaed documents under the specific provisions of Rules 45, 26, and 30, we do not imply that our rules empower the respondent attorney with the formal

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provisions of Rules 45, 26(a)(1)(B), and 30 by providing the attorney with notice of its subpoena and the documents produced from that subpoena.

V. The Protective Order

Having determined that Attorney E is a party in his own investigation and thus entitled to copies of the FBI documents, we address the terms and provisions of the protective order. Unquestionably, separate from the "confidentiality provisions" of Rule 251.31(a) and (b), the PDJ has the power to issue an order limiting the dissemination of information to protect the interests of third parties for good cause shown. C.R.C.P. 251.31(e); see also C.R.C.P. 26(c).

Pursuant to C.R.C.P. 251.31(e), the PDJ held that "good cause" was shown in this case for the issuance of a protective order. The PDJ reasoned that Attorney E's continued dissemination of documents describing the investigation of the ~~two~~ judge's ~~cocaine use~~ alleged misconduct posed a significant and substantial risk to the continued privacy of the two judges, other persons named in the documents, the judicial system, and the system of justice as a whole. The PDJ concluded that such a risk to privacy interests was compelling here because the United States Attorney determined that no violations of federal law occurred and closed its investigation of the two judges..

Neither ARC nor Attorney E appealed the PDJ's "good cause" ruling pursuant to 251.31(e) and thus did not provide any record of what the FBI documents contained so we could independently evaluate them. Thus, we must assume for

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discovery powers of a party under the rules of civil procedure during the investigation stage. While Rule 210.10 grants ARC specific investigative powers that must comply with the discovery rules, there exists no similar provision for the accused attorney during the investigation phase.

purposes of this case that the "good cause" standard of C.R.C.P. 251.31(e) was satisfied and a protective order was appropriate.

We focus, therefore, on the breadth of the protective order and the specific questions presented by Attorney E and ARC:

(1) Does the order violate Attorney E's First Amendment rights because it is a prior restraint on his speech? and (2) Does the order unduly prohibit ARC and Attorney E from prosecuting and defending, respectively, their cases? We turn to a discussion of each issue.

A. Protective Order Does Not Violate Attorney E's First Amendment Rights

Attorney E argues that he is not a party to the investigative proceedings and thus did not receive the documents as a result of discovery. Because he is not a party in the investigative proceedings, he concludes, the order constitutes an ongoing unconstitutional prior restraint on his speech. In the alternative, Attorney E argues that even if he were a party in the investigation, the protective order placed restrictions on information after it was released to the public and such ex post facto prior restraints are unconstitutional. We disagree.

Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976). As the Supreme Court has frequently held, any system of prior restraints of expression bear a heavy presumption against its constitutional validity. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). A court order that prevents speech from occurring is such a prior restraint. Near v. Minnesota, 283 U.S. 697, 713 (1931).

However, an order prohibiting parties from disseminating discovered information before it is revealed in a public proceeding is not the kind of "classic prior restraint" that requires exacting First Amendment scrutiny. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); Bowlen v. District Court, 733

P.2d 1179, 1182-83 (Colo. 1987). As the Supreme Court held in Seattle Times, such parties do not have an unrestrained right to disseminate information that they obtained only through the processes of our liberal discovery system. Seattle Times, 467 U.S. at 31.

In Seattle Times, the defendant, the Seattle Times, wanted to publish financial information it obtained through discovery about the plaintiff, a religious organization. The plaintiff obtained a protective order under the "good cause" standard of Rule 26 under the Washington Rules of Civil Procedure[16] because it alleged that publishing such information would adversely affect their membership and subject them to harassment. Id. at 22-27. The United States Supreme Court unanimously upheld the protective order and rejected the defendant's First Amendment challenge.

As background to its unanimous ruling, the Court described our liberal process of discovery and the interplay between pre-trial protective orders and the First Amendment. The Court explained that discovery rules often allow extensive intrusion into the affairs of both litigants and third parties. For example, as in this case, a litigant can compel a third party to be deposed and to produce tangible evidence. Id. at 30.

Such discovered information would rarely fall within the classes of unprotected speech. However, even if there is some public interest in knowing about the information, it does not necessarily follow that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery. Id. at 31.

The Court reasoned that because discovery rules were adopted by the state legislature, the processes therein are a matter of "legislative grace." Id. at 32. A party has no First Amendment right to access to information made available only

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[16] Wash. C.R. 26(c) is nearly identical to C.R.C.P. 26(c) and requires the same "good cause" showing as does C.R.C.P. 251.31(e).

for purposes of trying his or her case. Thus, "continued court control" over the discovered information in the form of protective orders does not raise the "same specter of government censorship that such control might suggest in other situations." Id.

To reflect the reduced level of First Amendment scrutiny to protective orders that limit the dissemination of discovery information, the Court announced a two-part balancing test which weighed the free speech right of litigants against the governmental interest of prohibiting the dissemination of discovery material: whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of speech and whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved. Id.

Applying this test, the Supreme Court upheld the protective order at issue because it satisfied the "good cause" requirements of Rule 26.

First, the Court held that Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of speech. Id. at 34. Because of the full disclosure provisions of the rules, it is necessary for the trial court to have authority to issue protective orders. Pretrial discovery has a significant potential for abuse, particularly because it may seriously implicate the privacy interests of third parties. Although Rule 26(c) contains no specific reference to "privacy," the Court explained that privacy interests are implicit in the broad purpose and language of the Rule. Id. at 35 n.21. Thus, the government has a substantial interest in preventing abuse of its discovery process under Rule 26 to protect such privacy interests. Id. at 34-35.

Second, the Court held that the protective order issued pursuant to Rule 26(c) did not limit First Amendment freedoms of the parties greater than necessary or essential for the protection of privacy interests. The order in the case prevented a party from disseminating only information obtained through the use of the discovery process. If the party obtained the same

information independently of the court's processes, the order did not preclude the party from disseminating such information. Id. at 34, 36. The Court concluded that because the protective order at issue was entered on a showing of good cause under Rule 26, was limited to the context of pretrial discovery, and did not restrict the dissemination of the information if gained from other sources, it did not offend the First Amendment. Id. at 37.

We applied the Seattle Times analysis in Bowlen. 733 P.2d at 1182. In Bowlen, we reviewed a protective order issued by a lower court under the "good cause" standard of C.R.C.P. 26(c). Because the United States Supreme Court held in Seattle Times that the "good cause" showing required under Rule 26 was sufficient to safeguard whatever rights the public posses in discovery materials, we found it unnecessary to address the extent to which discovery proceedings may implicate the First Amendment. Id. We concluded that even if a matter is of public interest, rather than a private affair between litigants, C.R.C.P. 26(c) and Seattle Times permit the trial court to protect private affairs from public disclosure until the material is admitted in a public proceeding. Id. at 1183.

Following the analysis of Seattle Times and Bowlen, we conclude that the protective order issued in this case pursuant to C.R.C.P. 251.31(e) for "good cause" shown does not offend the First Amendment. Although there may be a legitimate public interest in an FBI investigation of two judges because of their positions as governmental officials, we hold that the two-part balancing test weighs in favor of the protective order.

First, Rule 251.31(e) furthers a substantial governmental interest unrelated to the suppression of speech. Because of the specific disclosure rules that are incorporated into our attorney discipline system, the PDJ must and does have authority to issue orders that protect third-party privacy interests. Seattle Times, 467 U.S. at 34-35; Bowlen, 733 P.2d at 1183. In this case, the FBI documents obtained by Attorney E solely as a result of the discovery process implicate the type of privacy interests inherent in the broad purpose and language of the Rule. The documents described the FBI's ~~drug~~ investigation of ~~two~~ a Colorado judges.

Such documents clearly implicate the judge's privacy interests and have a significant potential for abuse, particularly in this case where Attorney E is under investigation himself for statements he made against these ~~same two~~ judges. Thus, the government has a substantial interest in preventing Attorney E from further abusing the discovery processes to protect the judge's privacy.

Second, the PDJ's protective order did not limit Attorney E's First Amendment freedoms greater than necessary or essential for the protection of the judges' privacy interests. The order in the case prevented Attorney E — as a party to the investigative proceedings -- from disseminating information obtained from the FBI documents during only ARC's pre-complaint stage. Seattle Times, 467 U.S. at 36. If he obtained the same information independently of his attorney discipline case, the PDJ's order did not preclude him from disseminating such information. Id. at 37. Thus, we conclude that under both the two-pronged balancing test of Seattle Times and the "good cause" showing required under Rule 251.31(e), the protective order in this case does not violate Attorney E's First Amendment rights. Bowlen, 733 P.2d at 1183.

We are also not persuaded by Attorney E's ex post facto argument that his First Amendment rights are offended because, even if he is a party to the investigative proceedings and received the FBI documents as a result of discovery, he originally obtained the documents without the restrictions of the protective order.

As held by the United States Supreme Court in Seattle Times, a trial court has the power of "continued control" over discovered information and such control does not raise the "same specter of government censorship that might suggest in other situations." 467 U.S. at 32. Such continued control necessarily implies that protective orders may be issued at any time during the discovery process. The trial court is in the best position to weigh fairly the competing needs of litigants and third parties affected by discovery and thus must have substantial latitude to fashion protective orders when the need arises. Seattle Times, 467 U.S. at 36.

The PDJ may exercise "continued control" and broad discretion over the discovery process and limit Attorney E's use of the FBI documents after he disseminated them. Attorney E received the FBI documents due to the "legislative grace" of the state's discovery provisions. Hence, the state, through the PDJ, may prevent abuse of its discovery process at any point that good cause is shown. Arguably, because of the privacy interests implicated by the FBI documents, ARC should have moved for such a protective order prior to its disclosure of the documents to Attorney E.[17] Although ARC failed to take such steps, we find that good cause still exists to prevent Attorney E, as a party to the investigative proceedings, from further disclosure of the FBI documents.

Indeed, the primary case cited by Attorney E in support of his ex post facto argument, Procter and Gamble Co. v. McGraw-Hill Co., 78 F.3d 219 (6th Cir. 1996), does not apply here. Procter presents the classic prior restraint issue that requires exacting First Amendment scrutiny: whether a court can subject the press, not a party to the litigation, to a prior restraint on publication of discovery material that it lawfully received unrestricted. Id. at 221. As the Sixth Circuit explained in striking down the lower court's protective order, such a

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[17] ARC stated that Attorney E gave no warning that he planned to disseminate the FBI documents and that it was shocked when he did so. Because the underlying discipline case against Attorney E involved statements that he made against the ~~two same~~ judges, we find that ARC had reason to believe that Attorney E would disseminate the FBI documents. Thus, given the nature of the FBI documents that described the investigation of the judge's ~~cocaine use~~ alleged misconduct and Attorney E's past statements about the judges, it would have been appropriate for ARC to petition the PDJ for a protective order to protect the interest of the judges as "third parties" under C.R.C.P. 251.31(e).

prohibitive practice is contrary to the First Amendment's guarantee of freedom of the press and is always unconstitutional absent exceptional circumstances. Id. at 225.

Such is not the case here. Although Attorney E "lawfully received" the discovery information unrestricted, he is a party to the investigative proceedings and thus information he received only through the process of discovery in such proceedings may be properly restricted upon a showing of good cause. C.R.C.P. 251.31(e).

Thus, based upon Seattle Times and Bowlen, we conclude that the protective order in this case does not violate Attorney E's First Amendment rights.

B. The Protective Order Must be Modified Because it Unduly Hinders both ARC and Attorney E's Ability to Further Their Respective Cases

Having addressed the First Amendment issue, we turn to the practical implications of the protective order in terms of the furtherance of the underlying investigation of Attorney E. ARC argues that if the protective order is allowed to stand, it will not be able to use any of the statements made in the FBI documents, or the documents themselves, to question witnesses, or otherwise as a basis for further investigation without further order from the PDJ. Attorney E argues that the protective order precludes him from interviewing or investigating sources of potentially exculpatory evidence without running the risk of being held in contempt for violating the order. We agree with both ARC and Attorney E.

Both parties to these investigative proceedings -- ARC and Attorney E -- must be able to use the documents in a limited way to prosecute and defend their respective cases even though there exists good cause to protect the privacy interests of the

judges.[18] Otherwise, subpoenaed information about the FBI's investigation of the ~~two~~ judges, clearly relevant to the inquiry of Attorney E's statements about the ~~same~~ judges, has no purpose. Consequently, ARC's investigation of Attorney E is unduly hampered because even if it can subpoena certain information, it cannot use it. C.R.C.P. 251.10(b)(2). Attorney E, on the other hand, cannot effectively defend his case and participate fully in the investigation, as is his responsibility under the rules. C.R.C.P. 251.5(d). Given the implications of a protective order that prevents both parties from making any use of relevant documents, we conclude that the PDJ must modify the protective order to allow the limited use of the FBI documents by both parties.[19] However, considering the privacy interests of the two

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[18] We note that in the absence of a protective order, our rules allow the accused attorney to disclose any documents he or she receives during the investigative proceedings. On the other hand, ARC may not publicly disclose such documents unless one of the circumstances listed in Rule 251.31(b) exists. See supra, note 12. ARC may disclose information, documents and correspondence which are not the subject of a protective order as necessary to investigate allegations against the accused attorney.

[19] Arguably, the protective order can be read to permit broader use of the documents than either party argues. This interpretation is buttressed by the PDJ's oral comments at the conclusion of the hearing on the protective order:

> [Attorney E's Counsel]: Your Honor, at least partly this would lie – would be a question to Regulatory [sic] Counsel, but I take it, your order as you presently have it in mind would prevent Attorney E from talking to any of the individuals identified in the FBI reports to determine the truth or falsity of the allegations made.
>
> [PDJ]: If the source of the identity of those individuals is solely from these documents, I don't think it would preclude [Attorney E] from talking with them, but it would preclude [Attorney E] from disclosing the information within the documents.

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judges named in the documents and consistent with the PDJ's oral comments, the parties should not be able to disclose the existence of the documents themselves or to inform witnesses that the information comes from a FBI document. To the extent that either party finds it necessary and essential to their respective cases to disclose to witnesses that certain information comes from the confidential documents, they may apply to the PDJ for a modification of the protective order to permit such disclosure. Whether such disclosure is necessary will depend upon specific facts presented to the PDJ. By allowing limited use of the documents as needed by the circumstances of this case, the protective order appropriately will balance the privacy

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> [Attorney E's Counsel]: Well, if the information within the document is that . . . you were involved in a car-theft ring, is that true of false? He can't do that . . . .
>
> [PDJ]: You can ask the question different ways. Your example, the question could be asked, Are you involved in a car ring? That doesn't disclose any information from the document. But to say, Look, I have these FBI documents in which its alleged that you're in a car ring, are you? That discloses information.

interests of third parties named in the documents with the investigative purposes of our attorney regulation system.

VI. Conclusion

The rule is made absolute in part and discharged in part, and the case is remanded to the Presiding Disciplinary Judge with directions to modify the protective order consistent with this opinion.